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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF AMICI CURIAE FOR THE AMERICAN COUNCIL OF LIFE INSURANCE, THE ALLIANCE OF AMERICAN INSURERS, THE ASSOCIATION OF CALIFORNIA LIFE INSURANCE COMPANIES, THE HEALTH INSURANCE ASSOCIATION OF AMERICA, AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF THE PETITIONER

ERWIN N. GRISWOLD
Counsel of Record
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3898
Counsel for the Amici

[Of Counsel Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

RICHARD E. BARNSBACK
PHILLIP E. STANO
American Council of Life Insurance
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2183

RICHARD P. HEFFERAN
Alliance of American Insurers
1501 Woodfield Road
Suite 400 West
Schaumburg, IL 60173
(708) 330-8560

BRAD WENGER
Association of California Life
Insurance Companies
1400 K Street, #208
Sacramento, CA 95814
(916) 442-3648

WOODROW E. ENO
THERESA L. SOROTA
Health Insurance Association
of America
1025 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-7822

PATRICK J. MCNALLY
MONIKA LUSSNIG
National Association of
Independent Insurers
2600 River Road
Des Plaines, IL 60018
(708) 297-7800

QUESTION PRESENTED

This brief addresses the following question:

Whether the excessive and disproportionate nature of the ten-million-dollar punitive damages award violated TXO's substantive due process rights.

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INTERESTS OF THE AMICI

The *amici* are trade associations representing the interests of many of the life, health and property and casualty insurers in the United States.[1] Specifically, the American Council of Life Insurance, the largest life in-

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[1] Counsel for both the Petitioner and the Respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

surance trade association in the United States, represents the interests of 611 member life insurance companies; these companies currently underwrite 95 percent of the life insurance in force in legal reserve life insurance companies in the United States. The Alliance of American Insurers represents approximately 180 insurance companies that write property and casualty insurance nationwide, with annual premiums representing over ten percent of such insurance. The Association of California Life Insurance Companies represents the interests of 40 member companies that write the vast majority of life and disability insurance in California. The Health Insurance Association of America represents the interests of 260 member companies that provide approximately 70% of the fully insured commercial health insurance in the United States. The National Association of Independent Insurers, the largest association of property and casualty insurers in the country, represents over 560 property and casualty insurers writing over one-quarter of the property insurance sold in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the *amici's* members. In recent years, courts have permitted juries to assess substantial punitive damages awards against insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance. Because of their genuine interest in the constitutionality of current punitive damages law, therefore, the *amici* have filed briefs in this Court in prior cases involving this issue. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

This brief presents to the Court the views of the *amici*, based on the experiences of their broad-based constituencies, on one of the issues in this case: whether the excessive and disproportionate nature of the $10,000,000 punitive damages award violated TXO's substantive due process rights.

STATEMENT

1. Because Petitioner sets the facts forth fully in its brief, the *amici* only summarize the facts here. In late 1984, TXO Production Corp. ("TXO") became interested in the oil and gas rights in land known as the Blevins Tract (Pet. App. 7a). Tug Fork Land Company ("Tug Fork") managed the Blevins Tract (*id.*). Tug Fork had previously leased the land's oil and gas development rights to George King, who in turn had leased the rights to Alliance Resources Corporation ("Alliance") (*id.*). In early 1985, TXO and Alliance reached an agreement concerning the oil and gas rights in the Blevins Tract (*id.* at 8a). TXO then retained a law firm to examine the title to the Blevins Tract (*id.* at 9a). The title report disclosed an apparent problem with a 1958 deed (*id.*). TXO obtained and recorded a quitclaim deed (*id.* at 11a).

2. In August 1985, TXO filed an action for a declaratory judgment to quiet title (Pet. App. 12a). Respondents counterclaimed, alleging slander of title (*id.*). The court bifurcated the issues for trial (*id.*). In the declaratory judgment action, the court found that there was no defect in the title (*id.*). On the counterclaim, a jury found for respondents and awarded $19,000 in compensatory damages—which represented solely attorneys' fees (*id.* at 20a)—and $10,000,000 in punitive damages (*id.* at 12a). The court, with no explanation, denied TXO's

motion for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur (Pet. App. 56a, 74a).

3. The West Virginia Supreme Court of Appeals affirmed (Pet. App. 1a). Among other things, the court rejected TXO's substantive due process challenge to the punitive damages award (*id.* at 39a-40a). In doing so, the court specifically stated that, "because appellant and its agents and servants failed to conduct themselves as gentlemen, we decline to enter a remittitur" (*id.* at 7a). The court then announced general guidelines for determining whether a punitive damages award was unconstitutionally excessive, concluding that it would not apply to this case its recent decision in *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), which established numerous factors for punitive damages review in light of *Pacific Mutual Life Ins. Co. v. Haslip*. The court delineated three categories of defendants: (1) "really stupid" defendants, (2) "really mean" defendants, and (3) "really stupid defendants who could have caused great harm but who actually caused minimal harm" (*id.* at 35a-36a). The court then stated that a ratio of five to one (punitive damages to compensatory damages) was roughly the limit for the really stupid defendants, while a ratio of even 500 to 1 was not excessive for the really mean defendants (*id.* at 38a-39a). Finding that TXO belonged in the "really mean" category (*id.* at 39a-40a), the West Virginia Supreme Court of Appeals found that the $10,000,000 punitive damages award was not excessive, even though it was 526 times the compensatory damages.

SUMMARY OF ARGUMENT

A. In *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991), this Court recently reaffirmed the rule that the Due Process Clause imposes substantive limits on the amounts of punitive damages that civil juries can award. The Court held that punitive damages are not

per se constitutional; it also specifically noted that punitive damages can "run wild." *Id.* at 1043. To be constitutional, punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 1045. This substantive due process analysis is based in the jurisprudence of this Court. The decision in *Day v. Woodworth*, 54 U.S. (13 How.) 363 (1851), which clarified the functions of punitive damages, and the subsequent adoption of the Fourteenth Amendment in 1866, which permitted federal courts to review state action under due process principles, laid the groundwork for substantive review of the amounts of extra-compensatory damages. Nearly a century ago, this Court began to review extra-compensatory damages in light of their deterrent and punitive purposes to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

B. While it is clear that the Due Process Clause imposes substantive limits on the size of punitive damages awards, the appropriate method for evaluating punitive damages under substantive due process principles is more elusive. This Court's decisions, however, demonstrate that determining whether a particular punitive damages award is constitutionally excessive involves an evaluation of both the competence of the institution that awards punitive damages and the rationality of these awards in light of their purposes.

1. The level of scrutiny of punitive damages awards under the Due Process Clause should depend, in part, on whether the jury rendering the award did so within meaningful bounds. This Court has made clear that the states' reasoned choices deserve considerable judicial deference. Politically accountable legislatures are well suited to the task of advancing a state's legitimate punitive and deterrent goals through appropriate legislation. To the ex-

tent that civil juries award extra-compensatory damages within such a framework, either legislatively or judicially established, therefore, those awards serve to enforce state choices and thus embody an institutional legitimacy warranting some deference. But jury awards rendered in the absence of such guidance have no comparable institutional legitimacy; juries merely examine isolated facts relating to a specific past incident and thus are unlikely to provide an award that will serve the states' broad forward-looking policy goals. Such unbridled jury awards are thus not entitled to any special deference.

2. Of course, jury awards of punitive damages that bear a rational relationship to the states' legitimate goals of deterrence and punishment may meet the due process test notwithstanding the absence of any legislative guidance. Without legislative guidance, however, analysis of the excessiveness of the award should be—as it was in *Pacific Mutual Life Ins. Co. v. Haslip*—fairly stringent and based on objective factors so as to ensure that the award rationally serves its dual purposes. Whether punitive damages awards are constitutionally excessive should turn, in the first instance, on whether the award rationally serves its deterrent purpose. To this end, courts may evaluate the jury's award for excessiveness using the amount of a defendant's actual or anticipated gain from his misdeeds and, in some cases, the plaintiff's reasonable litigation costs as appropriate objective indicia of a rational deterrence-based award.

This deterrence-based measure may, in some cases, underserve or overserve the second role that has been advanced in support of punitive damages, which is punishment. In such cases, courts can adjust the deterrence-based award to a level that rationally serves the punitive purpose as well. Courts may examine objective factors—such as whether a punitive damages award bears a rational relationship to a plaintiff's actual harm, as evidenced by the compensatory damages awarded, and

whether the award exceeds criminal or civil penalties for comparable conduct—in order to determine the appropriate "punitive" adjustment to the deterrence-based measure. This purpose-oriented, objective analysis ensures that, consistent with the Court's substantive due process principles, extra-compensatory awards will bear a rational relationship to their purposes without violating the constitutional rule against excessiveness.

3. This analysis makes abundantly clear that the punitive damages award in this case, rendered in the absence of any legislative guidance, rationally serves neither purpose. It exceeds any objectively-based deterrence measure of punitive damages. And it greatly exceeds any objectively-based amount that might fairly serve to "punish" TXO. It is, therefore, constitutionally excessive.

ARGUMENT

JURY AWARDS OF PUNITIVE DAMAGES IMPOSED IN AMOUNTS BEARING NO OBJECTIVE, RATIONAL RELATIONSHIP TO THE PURPOSES OF DETERRING AND PUNISHING A CIVIL DEFENDANT'S CONDUCT ARE CONSTITUTIONALLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE

The Fourteenth Amendment imposes limits on state legislative and judicial actions. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). Where those actions exceed the limits of substantitve due process, it is the responsibility of this Court to uphold the requirements of the federal Constitution. While it is obviously a difficult and delicate area—so that this Court's recent caution is fully understandable—only this Court can firmly establish the limits that the Constitution places on punitive damages law. The decision in *Pacific Mutual Life Ins. Co. v. Haslip* began the process of setting constitutional guidelines, but it has left a mass of confusion in its wake. *See generally* W. H. Volz & M. C. Fayz, *Punitive Damages and The Due Process Clause: The Search for Constitutional*

Standards, 69 U. Det. Mercy L. Rev. 459 (1992). This brief thus urges the Court to set forth meaningful, objective standards for determining when punitive damages awards exceed the constitutional limit.

A. The Due Process Clause Imposes a Substantive Limitation on the Amounts of Punitive Damages That Civil Juries Can Award

1. This Court acknowledged the substantive, purpose-driven limitation on punitive damages awards in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1043-46. That limitation, however, is not new. It is well-grounded in history. Thus, in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), this Court observed that "[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff." And, it added, "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther by way of punishment or example." *Id.*

This Court's decision in *Day*, and the subsequent adoption of the Fourteenth Amendment in 1866, marked important steps in punitive damages doctrine. The Court in *Day* clarified the purposes justifying punitive damages awards as deterrence and punishment.[2] The subsequent

[2] *See also Milwaukee & St. Paul R.R. v. Arms*, 91 U.S. 489, 492-93 (1876). The Court has continued to identify deterrence and punishment as the principal purposes underlying punitive damages, as have the great majority of jurisdictions. *See Gertz v. Welch, Inc.*, 418 U.S. 323, 350 (1974); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991); *see also* 1 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 4.14 (1992); J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1126 (1984); Restatement (Second) of Torts § 908(1) (1979).

adoption of the Fourteenth Amendment gave federal courts the responsibility to evaluate whether state actions actually served these purposes or, on the contrary, violated "due process of law." The Fourteenth Amendment thus brought courts into the process of meaningful, purpose-based review of the amounts of extra-compensatory damages.

In the early part of this century, the Court began to review extra-compensatory damages awards under the Fourteenth Amendment to determine whether they were so "grossly excessive as to amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909); *see also Missouri Pacific Ry. v. Tucker*, 230 U.S. 340, 351 (1913). Under the "gross excessiveness" test, the Court independently evaluated whether the awards properly served the purposes—and in particular, the deterrent purpose—of those extra-compensatory damages. *See St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. 63, 67 (1919) (justifying penalty in light of "the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111 (justifying large award because the defendant's illegal business "was very extensive and highly profitable"); *Missouri Pacific Ry. v. Humes*, 115 U.S. 512, 523 (1885) (noting that legislation served as "the most efficient mode of preventing . . . the commission of injuries" and as an important incentive for victims to seek redress). In this manner, the Court determined whether these awards were "wholly disproportioned to the offense and obviously unreasonable." *St. Louis Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66-67. *See also Missouri Pacific Ry. v. Tucker*, 230 U.S. at 351 (Court struck down jury award as "grossly out of propor-

tion to the possible actual damages" and "arbitrary and oppressive"). This would seem to be essentially the same issue as that involved here.

2. In *Pacific Mutual Life Ins. Co. v. Haslip*, this Court again confronted an extra-compensatory damages award. While ultimately concluding that the punitive damages award was not excessive, this Court engaged in a lengthy and searching review to ensure that the award properly served the dual purposes of deterrence and punishment. 111 S. Ct. at 1043-46. The Court approved the Alabama system for evaluating punitive damages—a system that looks to a combination of several objective factors, including, for example, the costs of litigation and the defendant's profit from his misdeeds. The Court also examined the ratio of punitive damages to compensatory damages, concluding that a ratio of approximately four to one was "close to the line" of constitutional impropriety. *Id.* at 1044-46.[3] Thus, both history and the recent decision in *Pacific Mutual Life Ins. Co. v. Haslip* demonstrate that the Due Process Clause prohibits excessive punitive damages awards. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86; *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340.

B. Punitive Damages Awards Exceeding Amounts Rationally and Objectively Related to the Purposes of Deterrence and Punishment Are Constitutionally Excessive

The conclusion that the Due Process Clause of the Fourteenth Amendment encompasses a substantive rule against excessive punitive damages awards in civil cases does not end the inquiry. Rather, that conclusion necessarily leads to a more difficult examination of the contours of the

[3] The Court in *Pacific Mutual Life Ins. Co. v. Haslip* also examined the ratio of punitive damages to out-of-pocket expenses, concluding that a ratio of approximately 200 to one was "close to the line." 111 S. Ct. at 1046.

substantive rule. While the Due Process Clause is not susceptible to rigid tests (*see Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981)), this Court's substantive analysis of state laws under due process principles—reflecting both a deference to state choices and a requirement that the law meet its purposes—provides appropriate guidance here. Determining whether punitive damages awards are constitutionally excessive, therefore, requires an evaluation of (1) the competence of the institution that awards punitive damages, and (2) the rationality of these awards in light of their purposes.

1. One factor in judicial scrutiny of punitive damages awards is the level of guidance provided to the jury. While examination of punitive damages awards for excessiveness under due process principles must be made with due regard for state choices made by a state legislature, no comparable deference need be rendered to jury awards in the absence of such guidance. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 267, 281 (1989) (Brennan, Marshall, JJ., concurring).

The states plainly have legitimate interests in deterring and punishing certain misconduct against their citizens. When the states have acted to further these goals in their criminal statutes, this Court has recognized that the states' policy choices merit substantial deference:

> "[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy."

Gregg v. Georgia, 428 U.S. 153, 175-76 (1976) (citations omitted); *see also Weems v. United States*, 217 U.S. 349, 379-80 (1910).

When the states act to advance these same goals through their civil statutes, this Court has accorded simi-

lar deference to the states' legislative judgments, while recognizing that there are constitutional limits to legislative power. Thus, in reviewing an assessment of a civil statutory fine in *Waters-Pierce*, this Court stated:

> The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law.

212 U.S. at 111; *see also St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 66.

Both the deference and the limitation are appropriate. *See* G. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 147 (1982). When civil juries award punitive damages within a rational and appropriately limited framework, those awards give effect to state choices as to the amount of punitive damages and will, generally, serve the purposes of deterrence and punishment. *See Waters-Pierce Oil Co.*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. at 522 (noting that "the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion").

Jury awards of punitive damages rendered in the absence of such legislative guidance, in contrast, embody no such institutional legitimacy. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 281 (Brennan, Marshall, JJ., concurring). Juries do not speak with the same effect as democratically elected, politically accountable legislatures. The jury, as an institution, is not particularly well-suited to making broad policy decisions and is not politically accountable for those decisions. Quite the contrary, juries face individualized facts and are particularly ill-equipped to take into account the broad impact of a punitive award on others and thus to determine when

a penalty furthers the state's legitimate goals. *See, e.g.*, J. Sales & K. Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1159 (1984); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1258, 1320-21 (1976).[4]

Thus, while courts generally defer to the deliberative function of juries and to the verdicts that they reach, jury awards in civil cases are not inviolate—particularly where juries act free from legislative constraints. Indeed, this Court has noted, in another context, that "[i]f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial." *Linn v. United Plant Guard Wkrs., Local 114*, 383 U.S. 53, 65-66 (1966) (emphasis added); *see also Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 276-77. Exercising that duty does not unduly interfere with a state's legitimate interest in deterrence and punishment. Rather, this judicial review merely recognizes the jury's lack of institutional competence in advancing these interests, through arbitrary punitive damages awards, and

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[4] Professor Clarence Morris was far-sighted when he explained this issue almost sixty years ago. He wrote:

> In determining whether or not the defendant has been a "reasonably prudent man" or an "intentional wrongdoer," the jury's task is to reflect the social values of the community; the jury evaluates the defendant's past behavior, it determines whether or not his past conduct should be condemned. But in fixing the amount of punitive damages the considerations all look to the future conduct of the defendant and others; the question is: how large a judgment is needed to discourage this sort of conduct in the future? Evaluation of past conduct is a different type of problem from control of future behavior. It is evident that problems of social control may require more technical skill than jurymen have or can acquire. Probably, many on jury panels cannot think of punishment as a means to an end, as an expedient for reformation and deterrence, and only regard punisnment as legal, justifiable revenge.

C. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1179 (1931).

respects the role that courts must play in ensuring due process.[5]

2. Even in the absence of legislative guidance, punitive damages awards that bear a rational relationship to the purposes of deterrence and punishment may not be so excessive and arbitrary as to deprive a defendant of due process of law. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046; *St. Louis, Iron Mountain & So. Ry. v. Williams*, 251 U.S. at 67. Without legislative guidance, however, the courts must—as this Court did in *Pacific Mutual Life Ins. Co. v. Haslip*—conduct a thorough, objective analysis of the award in light of its purposes. 111 S. Ct. at 1044-46; *see also id.* at 1055 (Kennedy, J., concurring) (noting the majority's "detailed examination" of the Alabama punitive damages system). Indeed, in finding that the award in *Pacific Mutual Life Ins. Co. v. Haslip* was not excessive, this Court favorably pointed out the objectivity of the factors that the Alabama courts analyzed when examining punitive damages awards. *Id.* at 1044-46. By requiring courts to conduct an objective analysis of whether certain amounts of punitive damages are rationally related to their purposes—and, in particular, the purpose of deterrence—this Court can provide a workable and appropriate test of excessiveness that will protect against arbitrary and irrational punitive damages awards.

a. Examining the substantive contours of punitive damages law in light of its deterrent purpose is not a new concept. Nearly a century ago, this Court emphasized the deterrent function of extra-compensatory damages in reviewing them for "excessiveness" under the Due Process Clause. *See St. Louis, Iron Mountain & So. Ry.*

[5] Judicial scrutiny of jury awards likewise does not interfere with the jury's function under the Seventh Amendment. *Cf. Tull v. United States*, 481 U.S. 412, 425, 427 (1987) (Seventh Amendment does not require a jury to determine the amount of the "remedy" in a civil case, and "a determination of a civil penalty is not an essential function of a jury trial").

v. Williams, 251 U.S. at 67; *Waters-Pierce Oil Co. v. Texas*, 212 U.S. at 111; *Missouri Pacific Ry. v. Humes*, 115 U.S. at 523. More recently, this Court has given weight to this deterrent purpose in determining the availability of punitive damages in certain types of cases. The Court has found the risk of overdeterrence too great to justify awards of punitive damages against unions in "duty of fair representation" cases. *See International Bhd. of Elec. Wkrs. v. Foust*, 442 U.S. 42, 51-52 (1979). And, recognizing deterrence as a major objective of both punitive damages law and section 1983, the Court has found that allowing these damages against municipalities, as opposed to individual officials, would not advance that purpose. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267-270 (1981). This Court's emphasis on the deterrent function of punitive damages thus provides an appropriate guide, in the first instance, for defining the scope of the constitutional rule against excessiveness. Under a deterrence-based approach, an extra-compensatory award that exceeds an amount necessary to deter a defendant (and other potential defendants) from engaging in similar misconduct in the future is, in all likelihood, constitutionally excessive.

Assessing whether an award of punitive damages exceeds an amount necessary to deter a defendant should—in order to ensure rationality—turn on relatively objective factors. The amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045 (in approving Alabama punitive damages analysis, Court noted that one of the many factors that Alabama courts look to is the "profitability to the defendant of the wrongful conduct"); *see also* D. Dobbs, *Ending Punishment In "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831 (1989); D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1286. The defendant's profits from his misconduct—or, in some

cases, the expected profits where the defendant fails to profit as expected—are objectively-based and often ascertainable without substantial difficulty. Removing the actual or expected gain, in addition to requiring the defendant to compensate the plaintiff for his actual losses, makes it less likely that the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants and, thus, will often fully serve the deterrent function.

Of course, a "gain-based" measure of extra-compensatory damages may not always adequately serve this deterrent function; it may overserve or underserve this purpose. A defendant may, for example, escape effective deterrence when its conduct is rarely challenged in private litigation—i.e., when the cost of private enforcement exceeds the plaintiff's damages. *See* J. Mallor & B. Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L. J. 639, 650 (1980); *cf.* D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1285 (noting that the deterrent effect of punitive damages depends, in part, on "the manufacturer's perception of the likelihood of his being identified and punished"). In such a case, an appropriate measure of deterrence may include the plaintiff's reasonable litigation costs, to the extent not otherwise provided by statute. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045 (in approving Alabama punitive damages analysis, Court noted that one of the many factors Alabama courts look to is "all the costs of litigation"); *see also* D. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. at 890-94. Shifting the plaintiff's reasonable litigation costs to the defendant in these types of cases could achieve appropriate deterrence by encouraging otherwise uneconomical litigation and, at the same time, removing the defendant's incentive to continue his misconduct. This measure, as with the gain-based measure, is relatively objective and, given the courts' experience with assessing attorneys' fees, hardly unfamiliar.

Evaluating the amounts of extra-compensatory damages based on these relatively objective measures thus achieves the deterrent function of these damages without a substantial risk of overdeterrence from grossly excessive awards. This evaluation does not require a court to defer to the jury's subjective assessment of the amount necessary to deter future misconduct—an assessment that has led to a concern about punitive damages that "run wild." Rather, it permits a court to review a jury's extra-compensatory award based on objective factors that serve to approximate what will adequately deter defendants from future misconduct within constitutional limits.

b. Deterrence, however, is not the sole function of punitive damages. This Court has made clear that they function as "punishment" as well. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1045; *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 275; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 266-67. While extra-compensatory damages based on a deterrence-based measure will often serve simultaneously to deter and punish, there may be cases in which such a measure underserves the punitive function—as, for example, where a defendant expects no gain from his misconduct. In such cases, adjusting an extra-compensatory award to serve its punitive purpose may be necessary. *Cf.* D. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. at 1317 ("[t]he punishment function is the final factor to be considered in developing a standard for the measurement of punitive damages").

Whether a defendant "deserves" punishment beyond an amount necessary to deter his future misconduct turns on the gravity of his misdeeds. *See* D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 6 (1982). In *Pacific Mutual Life Ins. Co. v. Haslip*, this Court noted that the proper benchmark is whether the punitive damages awards "are not grossly out of proportion to the severity of the offense and have some

understandable relationship to compensatory damages." 111 S. Ct. at 1045. *See also Missouri Pacific Ry. v. Tucker*, 230 U.S. at 351 (noting that liquidated damages scheme was "grossly out of proportion to the possible actual damages"). Whether an extra-compensatory award properly serves its "punitive" function, therefore, depends on whether it bears a rational relationship to the defendant's conduct, measured with reference to such objective factors as the compensatory damages awarded and any legislative penalties for similar misconduct.

Though the Due Process Clause may not require punitive damages awards to represent exact multiples of compensatory, or actual, damages, punitive damages that are many times these damages raise, at a minimum, a serious concern that they overserve the punitive function. Indeed, this Court noted in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046, that a punitive damages award more than four times the amount of compensatory damages "may be close to the line" of constitutional impropriety. *Cf.* C. R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons From History*, 40 Vand. L. Rev. 1233, 1273 (1987) ("[a]n award of two to three times actual damages might be thought presumptively within the constitutional limits"). Several states have enacted statutes that limit to varying degrees punitive damages awards to amounts that are some low multiple of the plaintiff's actual damages, reflecting a reasoned judgment that any greater amount would not further the states' legitimate interests. *See, e.g.*, Colo. Rev. Stat. § 13-21-102 (1987); Conn. Gen. Stat. Ann. § 52-240b (West 1991); Fla. Stat. Ann. § 768.73 (1) (West Supp. 1992); Nev. Rev. Stat. Ann. § 42.005 (Michie Supp. 1991); Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1993). *Cf.* J. Clements, Comment, *Limiting Punitive Damages: A Placebo for America's Ailing Competitiveness*, 24, St. Mary's L.J. 197, 206-09 (1992) (summarizing various state legislative responses to punitive dam-

ages). It is thus reasonable to conclude that, as a general benchmark, an award within a relatively low multiple of compensatory damages—like the four to one multiple in *Pacific Mutual Life Ins. Co. v. Haslip*—would give adequate recognition to the "punitive" function.

This "ratio" approach is only one objective benchmark for determining what amount of extra-compensatory damages will serve the punitive purpose. What is an appropriate punishment for a defendant's misconduct may, in some cases, be apparent from legislative penalties for similar conduct. Many states have enacted statutes prescribing penalties, either civil or criminal, for certain intentional or negligent conduct that is similar to conduct that exposes a defendant to punitive damages. That legislative assessment concerning what "punishment" is appropriate serves an important role in ascertaining whether an extra-compensatory award for comparable conduct not subject to the legislative penalty is rationally related to that purpose. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 300-01 (O'Connor, Stevens, JJ., concurring in part and dissenting in part); *cf. Weems v. United States*, 217 U.S. at 380-81; *Pacific Mutual Life Ins. Co. v Haslip*, 111 S. Ct at 1046 (while declining to accord conclusive weight to analogous legislative fines, Court examined the Alabama legislative penalty for comparable conduct).

It is of course true that "the Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987). These objective factors are thus only guides, and there may be other appropriate objective factors. But, when applied as a check against punitive damages, these factors should ensure that punitive damages, when warranted at all, adequately—and rationally—serve both their deterrent and punitive purposes without violating the constitutional rule against excessiveness.

3. The punitive damages award in this case cannot stand under these principles. This case does not require the Court to review any legislative policy choice in West Virginia concerning the appropriate measure of extra-compensatory damages. The award in this case reflects only the decision of a West Virginia jury to assess, in the absence of any legislative guidance, a massive punitive damages award against TXO. The jury's award thus plainly did not deserve substantial deference. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. at 281 (Brennan, Marshall, JJ., concurring).

A purpose-based analysis—comprised of several objective factors—of the jury's $10,000,000 punitive damages award makes it plain that the award was constitutionally excessive. As an initial matter, the award greatly exceeds any deterrence-based measure of punitive damages. TXO gained nothing from its misconduct, and it is difficult indeed to find any anticipated gain. In any event, surely such anticipated gain could not have approached $10,000.000. And respondents' litigation costs amounted to only $19,000. A deterrence-based measure would thus not come close to $10,000,000. Further, assuming that the deterrence-based measure underserved the punitive purpose of punitive damages here, the objective factors under the punitive analysis demonstrate as well the excessiveness of the award. Calculation of a low multiple of respondents' compensatory damages, *i.e.*, a low multiple of $19,000, would come to only a very small percentage of $10,000,000. Indeed, the punitive damages award here is 526 times greater than the compensatory damages award.

Instead of analyzing the amount of the award with reference to several objective factors in order to ensure that the award rationally served its purposes, the West Virginia Supreme Court of Appeals set forth guidelines that are purely subjective and that invite only irrational results. The West Virginia court delineated three categories of defendants: "really stupid" defendants, "really

mean" defendants, and "really stupid defendants who could have caused great harm but who actually caused minimal harm." Proper placement in a category is critical under West Virginia's scheme. For the "really stupid" defendants, the West Virginia court found the outer limit ratio of punitive damages to compensatory damages to be roughly five to one. For the "really mean" defendants, however, the West Virginia court provided no proportional limit whatsoever, stating instead that a ratio of even 500 to 1 was not necessarily unconstitutional. Despite the drastically disparate consequences of being in a particular category, however, even the West Virginia court acknowledged that fact patterns might fall within both categories (Pet. App. at 36a n.11).

This system of analyzing the constitutionality of punitive damages awards makes a mockery of the Due Process Clause and this Court's interpretations of it.[6] At a minimum, the lack of any proportional limit for the "really mean" defendant does not square with this Court's teachings in *Pacific Mutual Life Ins. Co. v. Haslip*, much less the principles of proportionality that the Court has previously endorsed. Indeed, in *Pacific Mutual Life Ins. Co. v. Haslip*, this Court found that a ratio of four to one was "close to the line" of constitutional impropriety, based on a fact pattern that would seem clearly to fall within the "really mean" category in West Virginia, since it involved intentional fraud. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. at 1046. This finding is plainly at odds with the West Virginia court's conclusion that a ratio of even 500 to 1 for the "really mean" category—whatever that is—would not be unconstitutional.

The punitive damages award of $10,000,000 against TXO plainly lacked "objective criteria," the mode of analysis that this Court approved in *Pacific Mutual Life*

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[6] Indeed, two justices of the West Virginia Supreme Court of Appeals noted that the majority's categories were "ridiculous" (Pet. App. 53a-54a).

Ins. Co. v. Haslip. The court below did not analyze—in contrast to the courts in Alabama—a combination of several objective factors to determine whether the $10,000,000 award rationally served the purposes of deterrence and punishment. And it did not do so despite the fact that its seminal post-*Haslip* case, *Garnes v. Fleming Landfill*, 413 S.E.2d 897 (W. Va. 1991), delineated a combination of objective factors that "are interactive and must be considered as a whole when reviewing punitive damages awards" (Pet. App. 33a-35a). They key, therefore, is the balance of objective factors. The lower court's failure to balance objective factors represents a failure to abide by *Pacific Mutual Life Ins. Co. v. Haslip* and its own prior interpretation of that case, resulting, unsurprisingly, in a skewed award. The West Virginia court likewise failed to analyze whether the award was so disproportionate to the respondents' compensatory damages as to be constitutionally excessive. If the punitive damages award in *Pacific Mutual Life Ins. Co. v. Haslip* was close to the line—taking into account the purposes of deterrence and punishment—then the award here must have crossed that line.

In practical terms the problems here may be summarized.

1. Under our federal system, the law of torts, including damages for torts, is essentially a matter of State law. The Court is understandably reluctant to make decisions that will convert tort cases—or at least state court cases involving punitive damages—into "federal cases," thus shifting substantially the balance between the state and federal courts in the tort field.

2. The Court also has legitimate concerns about its own case load. Understandably, it does not welcome a decision that would bring a large number of State tort cases here for review. Having in mind its resources and

its other responsibilities, it could review only a tiny percentage of such cases. This would have little impact on the overall problem.

In this situation, the Court has sought to urge the State courts to accept the fact that application of the Due Process Clause in tort cases is as much the responsibility of the State courts as of this Court. *See, e.g., Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991); *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). It has made general statements about Due Process limitations, hoping that its limits will be taken seriously, but, in the modern era, it has not reversed any decision in this area. It has spoken clearly, but it has not put teeth behind its words. Unfortunately—but not surprisingly, considering the forces which operate in this area—this approach has not worked, as this case abundantly shows. The time has come when this Court should take clear action, by reversing the decision below in this case. Of course, the question is one of degree, but it is none the worse for that. The law of torts is full of questions of degree. Most of them are unlikely to involve the federal Constitution. But somewhere there is a line where punitive damage awards become unconstitutional under the Due Process Clause. If there is such a line—and there surely is—this case has gone beyond it.

A reversal here would have a sobering and a salutary effect, particularly if it is accompanied by a statement of rules—perhaps including outside numerical multiples—that would be of assistance to the State courts in meeting their responsibilities under the federal Constitution. *Cf. Miranda v. Arizona*, 384 U.S. 436 (1966). With such rules established under the federal Constitution—which is this Court's special concern—perhaps any volume of appeals brought here could be handled generally by *per curiam* decision. With a suitable number of these, State courts could come to know the appropriate limits and know that they are real and will be enforced, with

the result that the volume of appeals here could be kept under control. This Court need not be and should not be a National Court of Tort Appeals, but it inescapably has the responsibility of establishing and enforcing appropriate limits under the federal Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

ERWIN N. GRISWOLD
Counsel of Record
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3898
Counsel for the Amici

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[Of Counsel listed on following page]

Of Counsel:

RICHARD E. BARNSBACK
PHILLIP E. STANO
American Council of Life Insurance
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2183

RICHARD P. HEFFERAN
Alliance of American Insurers
1501 Woodfield Road
Suite 400 West
Schaumburg, IL 60173
(708) 330-8560

BRAD WENGER
Association of California Life
Insurance Companies
1400 K Street, #208
Sacramento, CA 95814
(916) 442-3648

WOODROW E. ENO
THERESA L. SOROTA
Health Insurance Association
of America
1025 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-7822

PATRICK J. MCNALLY
MONIKA LUSSNIG
National Association of
Independent Insurers
2600 River Road
Des Plaines, IL 60018
(708) 297-7800